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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 264 (24,405)

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, *Appellants,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

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THE HAINES TILE & MANTLE COMPANY, *Appellant,*

vs.

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS.

CHESTER I. LONG,
J. A. BRUBACHER,
GEORGE GARDNER,
A. M. COWAN,
Solicitors for Appellants.

CRANE & CO., TOPEKA

SUBJECT INDEX.

CASES CITED.

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STATEMENT OF THE CASE.

THE controversy here involved arose in the course of bankruptcy proceedings and presents the question of priority of mechanics liens over mortgages. Prior to January 3, 1911, P. J. Conklin, one of the appellees in these cases, was the owner of a lot or tract of vacant ground in the city of Wichita, Kansas, fully described in the record and commonly called the "Waco Avenue property". On December 20th, 1910, Conklin and the bankrupt, Bron, entered into

negotiations in regard to the sale of this property. Bron, the bankrupt, was engaged in the business of buying city lots and causing the same to be improved by the erection of buildings thereon. P. J. Conklin was familiar with Bron's business, and knew that this property was to be used for the purpose of erecting a building upon it. On January 3, 1911, a deed dated December 31, 1910, was duly executed and acknowledged by Laura Conklin and P. J. Conklin. (Rec. p. 12.) On January 3, 1911, Conklin sold and conveyed the property to Bron. (Opinion of District Court, Rec. p. 125; Finding of Referee, Rec. p. 9.) Bron agreed to purchase the vacant property from Conklin for the consideration of $4,500.00, an amount in excess of its true market value, and Conklin agreed to take back a mortgage from Bron for the entire purchase price of the land and make such mortgage inferior to a mortgage of $7,500.00. (Opinion of District Court, Rec. p. 125.)

The agreement was carried out, and Conklin conveyed the vacant property to Bron on January 3rd, and on January 4th Bron executed and delivered a first mortgage to one E. D. Kimball in the sum of $7,500.00 and a second mortgage to Conklin for $4,500.00, and also a commission mortgage. The deed was recorded on January 4, 1911, at 11:40 A. M. The mortgages were recorded on January 4, 1911, at 12:10, 12:20, and 12:30 P. M. respectively.

The note secured by the first mortgage was, soon after its making and before the building was completed, transferred by Kimball to The New Hampshire Savings Bank, one of the appellees.

The property was greatly improved by the bankrupt Bron, at much expense, to wit: $13,300.00. (Rec. p. 67.) Many mechanic and labor liens were filed against the property, aggregating $7,946.50. (Opinion of District Court, Rec. p. 126.) The appellants in the cases before this court are some of the mechanic lien holders. The appellees are the Savings Bank, the assignee of the first mortgage given to E. D. Kimball, and P. J. Conklin, the holder of the mortgage given for the purchase price of the vacant property.

The referee and the District Court found that the work of improving the property was commenced at an early hour on January 3, 1911. (Rec. pp. 126, 9, 10.)

This work consisted of digging a ditch about 18 inches

wide, 5 or 6 inches deep and 38 feet long in starting the foundation. (Rec. p. 61.) Prior to this time several trees and the brush had been cleared away. The ground had been staked, and was re-staked on the morning of January 3rd before the work was done. (Rec. pp. 58, 60, 25, 52). A load and a half of dirt was hauled away that morning. Shovels, picks, a scraper and a plow were taken to the premises at the beginning of the work that morning. About ten o'clock the morning of January 3rd work was stopped on account of the extreme cold. (Rec. pp. 56, 34.) The work of excavating was continued the morning of January 4th, commencing about eight o'clock. The work proceeded all that day, about fifteen loads of dirt being hauled away (Rec. pp. 27, 56, 66), and thereafter continued from day to day until completed.

The property was sold by the Trustee. There not being enough money to satisfy the material men and the mortgages, a controversy arose as to who was entitled to preference. The Kansas law giving material men and mechanics, liens (Section 6244 General Statutes of Kansas, 1909) is as follows:

> "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement, or structure thereon . . . shall have a lien upon the whole of said piece or tract of land, the buildings and appurtenances, in the manner herein provided. *Such lien shall be preferred to all other liens or incumbrances which may attach to, or upon said land, buildings or improvements, or either of them, subsequent to the commencement of such building.*" (Italics ours.)

The Kansas law relating to the recording of deeds and mortgages is Section 1672 of the General Statutes of Kansas, 1909, as follows:

> "No such instrument in writing shall be valid, except as between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

The Referee found that the work on January 3rd was *fraudulently begun* by the bankrupt Bron for the purpose of giving preference over the mortgages to any mechanics liens to be thereafter created and established. (Rec. p. 10.) Upon review, the District Court held that the *motive* with which the work was done was immaterial and set aside the order of the Referee and allowed priority to the mechanics liens. (Rec. pp. 125, 128.)

Thereupon, appeals were taken by the mortgagees to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the District Court and directed that the mortgages be made prior liens on the property superior to the mechanics liens. Thereupon, the mechanics lien holders prosecuted these appeals to this court.

The questions here involved are as follows:

Whether or not the work was begun for the excavation of the foundation before the recording of the mortgages in question.

Whether or not the property was conveyed and the bankrupt Bron was entitled to possession of the property shortly after noon on January 3rd.

Whether or not the work done on January 3rd and the morning of January 4th was such a commencement of the building as to give the mechanic lien holders a prior lien under the Kansas statute.

Whether or not the *motive* with which the work was done on January 3rd and the morning of January 4th by the bankrupt Bron can affect the mechanic lien holders' rights to a priority, and whether there is any evidence to establish fraudulent motive.

There is also involved the question of whether or not under the statute of frauds of Kansas, an oral agreement that the mortgage to Kimball should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt Bron, and be a prior lien on the property, was valid as against mechanic lien holders.

The appellants also contend that as mechanic lien holders, they are entitled under the laws of Kansas to a priority upon the enhanced value of the improvements given to the property by their materials, regardless of the priority of the mortgages.

Appellants insist that the decision of the Circuit Court of Appeals is far-reaching and injurious in its effect on the business of building supply dealers in Kansas and Oklahoma, who have been furnishing materials in reliance on the protection they thought was afforded them by the mechanic lien statutes. The decision of Circuit Court of Appeals has injected into the statute the question of the *motive* with which the work of commencing the building is done. Thus the protection which was heretofore certain has become uncertain, depending upon what may be afterwards proved as to the motive lurking in the mind of the owner in having the work done.

ASSIGNMENT OF ERRORS.

I.

The court erred in deciding and holding that the mortgages of the New Hampshire Savings Bank and P. J. Conklin were prior liens upon the property in question, and superior to the mechanics lien of G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company.

II.

The court erred in reversing the judgment and decree of the District Court, which adjudged and held the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to be prior to the mortgages of The New Hampshire Savings Bank and P. J. Conklin.

III.

The court erred in holding that the deed to the bankrupt was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4, 1911, and that the right of possession did not vest in the bankrupt until January 4, 1911, for the reason that by stipulation of the parties filed in the cause (Transcript of Record p. 12) it was agreed and admitted that Mrs. Conklin acknowledged the deed January 3rd, and for the further reason that the

Referee in Bankruptcy and the District Court found that the property in question was conveyed to the bankrupt on January 3, 1911, while by stipulation of all of the parties it was agreed and admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were acknowledged on January 4th and filed for record after noon on that day.

IV.

The court erred in holding that the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin attached simultaneously with the vesting of the legal title, and that the legal title vested in the bankrupt on January 4, 1911, and were prior to the mechanics lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, for the reason that the Referee in Bankruptcy and the District Court found that the property was conveyed to the bankrupt on January 3, 1911, and by stipulation of all parties hereto it is admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were not recorded until after noon of January 4, 1911.

V.

The court erred in holding that the mechanics lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, was not a first and prior lien on the improvements put upon the real estate by them, independent of the real estate without the improvements.

VI.

The court erred in holding that the vesting of title in the bankrupt and the attaching of the mortgage liens were simultaneous acts, and that therefore the mortgage liens were prior to the mechanics liens, for the reason that the court found that the deed was delivered in the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement, and the liens of the mortgages did not attach until after noon on the same day.

VII.

The court erred in holding that the vesting of the legal title in the bankrupt and the attaching of the mortgage liens were simultaneous acts and that therefore the mortgage liens were prior to the mechanics lien, for the reason that the alleged agreement between the bankrupt and P. J. Conklin that the delivery of the deed and the execution and recording of the mortgages were to be part of one transaction was not shown to be in writing as required by Section 3838 of the General Statutes of Kansas, 1909, then in full force and effect, and therefore such agreement, if any, was null and void.

VIII.

The court erred in holding that the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, was inferior to the mortgage lien of The New Hampshire Savings Bank, for the reason that the said mechanics lien attached to the legal and equitable estate of the bankrupt prior to the recording of the mortgage of the said The New Hampshire Savings Bank after noon of January 4, 1911.

IX.

The court erred in holding that the vesting of the title in the bankrupt through the delivery of the deed from P. J. Conklin and wife, and the attaching of the mortgage lien of The New Hampshire Savings Bank were simultaneous acts, and that therefore the said mortgage lien was prior to the mechanics lien of G. F. Varner and W. E. Marshall, for the reason that the court found that the deed was delivered during the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement, and the mortgage lien of The New Hampshire Savings Bank did not attach until after noon on the same day.

X.

The court erred in holding that the work done by the

bankrupt on the morning of January 3rd and the morning of January 4th in excavating for the foundation of the building was not such work as amounted to the commencement of the building, for the reason that the intent or purpose with which the bankrupt did the excavating could not affect, defeat or postpone the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, they not being required under the Kansas mechanics lien law to ascertain the intent which actuated the owner in commencing the improvement.

XI.

The court erred in holding that the intent and purpose with which the bankrupt began the excavation for the building on January 3rd and the morning of January 4th, 1911, subordinated the mechanics lien of G. V. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin, whose mortgages were not filed for record until after noon of January 4, 1911, the intent of the owner in commencing the improvement not being material in this controversy between lien holders.

XII.

The court erred in holding that as to P. J. Conklin and the assignor of The New Hampshire Savings Bank, E. D. Kimball, the work done by the bankrupt's son and Underwood on the premises on the morning of January 3rd and the morning of January 4th, 1911, and prior to the execution and recording of the said mortgages, was not such work as amounted to the commencement of the building within the meaning of the Kansas statute, for the reason that both said P. J. Conklin and E. D. Kimball knew at said time that a building was to be erected upon the premises, and said Conklin had agreed to convey said property to the knowledge of said Kimball with that object in view.

(The Assignment of Errors in the other cases are the same.)

I.

THE PROPERTY IN CONTROVERSY WAS CONVEYED TO THE BANKRUPT ON JANUARY 3, 1911, AND THE WORK OF EXCAVATING FOR THE FOUNDATION WAS BEGUN ON JANUARY 3, 1911, AND CONTINUED ON THE MORNING OF JANUARY 4, 1911.

It is a well settled rule of this court, that findings of fact made by a master and approved by the District Court will not be set aside except where it is clearly shown that the findings are totally unsupported by the evidence. *Arana De Villaneuva v. Villaneuva*, —— U. S. ——, 36 Sup. Ct. Rep. 109; *Tilghman v. Proctor*, 125 U. S. 138, 8 S. Ct. 894.

The same rule obtains in the various circuits in bankruptcy matters. *Poff v. Adams, Payne & Sleave*, 226 Fed. 187; *Boswell National Bank v. Simmons*, 190 Fed. 735; *Coder v. Arts*, 152 Fed. 943; *Epstein v. Steinfeld*, 210 Fed. 236; *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155; *Hussey v. Richardson-Roberts D. G. Co.*, 148 Fed. 598.

Yet the Circuit Court of Appeals in this case has stated that several facts are undisputed, which are not only contrary to the express findings of the Referee and the District Court, but contrary to the express stipulation of the parties. The Circuit Court of Appeals states that the negotiations for the purchase of the land by the bankrupt Bron from Conklin were consummated by the deed from Mrs. Conklin and her husband to the bankrupt Bron delivered January 4th, 1911. This is contrary to the express findings of the District Court and the Referee. The Referee found (Rec. p. 9):

> "Prior to January 3rd, 1911, the creditor Conklin was the owner of, and occupied as his homestead, the following described property: (Here follows description.)
>
> "*On that date Conklin conveyed this property by deed to Charles Bron, the bankrupt.*"

The District Court said:

> "The facts are, prior to January 3, 1911, P. J. Conk-

lin was the owner of a lot or tract of vacant ground in the city of Wichita, fully described in the record and commonly called the 'Waco Avenue Property'. On that day Conklin sold the property to the bankrupt who was engaged in the business of buying city lots and causing the same to be improved by the erection of buildings thereon."

Now what is the evidence to support this? The stipulation between the parties (Rec. p. 12) shows the deed acknowledged by P. J. Conklin and wife on January 3, 1911. Ginzel, son-in-law of appellee Conklin, took the deed to Mrs. Conklin at noon at her house and she attached her signature and he brought it back to the office about two o'clock. (Rec. p. 85.) The bankrupt Bron testifies positively that he received the deed from Conklin the afternoon of January 3rd and took it to Kimball, and on the strength of it received a check for $750.00 as an advance from Kimball (which check was introduced in evidence). (Rec. pp. 16, 45, 47.) The son of the bankrupt Bron, who assisted his father in the business, testified that his father told him the evening of January 3rd that he got the deed that day. (Rec. p. 29.) He fixed the date by its being the day following what is known as the "Bitting Fire". The Referee took judicial notice of the fact that such fire occurred on January 2nd. (Rec. p. 44.)

Now the only evidence opposed to this is that of P. J. Conklin, one of the appellees, who stated that he did not think the deed was out of his office the afternoon of the 3rd, and did not have any knowledge of its being out. (Rec. p. 82.) It was sent up the noon of the 3rd to Mrs. Conklin, although Conklin admits that he could have taken it home at night and could have had her sign it then. (Rec. p. 81.) He admits that Bron was in the office that afternoon, and that perhaps Bron may have needed the deed that day, and he trusted Bron. He could not swear positively whether it was taken out of his office that afternoon or not. (Rec. p. 82.) Mr. Conklin always acted for his wife in real estate matters, and she never interfered with his business at all. (Rec. p. 84.) Ginzel, Conklin's son-in-law, did not know whether the deed was taken by Bron the afternoon of January 3rd or not. (Rec. p. 88.) A. O. Conklin, son of appellee Conklin, admits that the bankrupt Bron was in the office the afternoon of January 3rd, but did not know

whether or not Mr. Bron took the deed out that afternoon. (Rec. p. 89.)

The only other witness to the affair was E. D. Kimball, to whom the $7,500.00 mortgage was given. He was not sure that he ever had the deed in his office. (Rec. p. 97.) After several days had intervened, Mr. Kimball, who had transferred the note to the Savings Bank and who was evidently liable on such indorsement, came to the conclusion, when placed on the witness stand again, that the deed was not in his office on January 3rd. (Rec. p. 108.)

It therefore appears from the evidence that this deed, which the Circuit Court of Appeals says it is not disputed was not delivered until January 4th, was actually delivered on January 3rd, and appellants have so contended from the beginning. The Referee and the District Court both found that the property was conveyed on January 3rd. It is therefore apparent that the Circuit Court of Appeals was in error on the subject, and the deed was delivered on January 3rd. It follows that the statement by the Circuit Court of Appeals that the deed was delivered and the mortgages filed of record as one transaction is erroneous. Likewise is the statement:

> "It is the contention of the appellees (appellants here) that the deed to Bron was delivered on January 3rd, but the great weight of the testimony convinces that the deed was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4th, and that it was not delivered until that morning there is no doubt under the testimony."

As we have already pointed out, the express stipulation of the parties (Rec. 12) and the instrument itself show that the deed was acknowledged by Mrs. Conklin on January 3rd. The findings of the Referee, the District Court, and the only positive evidence on the subject, shows it was delivered on January 3rd.

But, regardless of the date of the delivery of the deed, the sale was made on December 22nd. The terms were agreed upon December 22nd, the deed was drawn on December 31st and the abstract delivered to Bron. Such is the testimony of P. J. Conklin, the real owner of the property, and of Bron, the bankrupt. (Rec. pp. 78, 80, 84, 45,

state, there can be no doubt but that when the work for the excavation for the foundation or cellar of a building to be erected is begun, the work of improving the property has *commenced* within the meaning of the statute, and that any person can then search the records, and if no mortgage or other incumbrance be found of record, he may safely rely on his rights under the law to perfect a mechanic's lien in the furnishing of labor or material used in the construction of such improvement, as against any such encumbrance thereafter filed."

The Court of Appeals agreed with the law as stated above, but held that the work was not sufficient to amount to the commencement of the building. (Rec. p. 150.)

This holding purports to be based upon the decision in *Kansas Mortgage Company v. Weyerhaeuser*, 48 Kan. 335. That decision was limited to a determination of whether or not placing material upon the ground was the commencement of a building. The Supreme Court of Kansas held that it was not, saying:

> "The commencement of a building in law takes place with the digging and walling of the cellar. It is some *work or labor on the ground, such as beginning to dig the foundation* which everyone can readily see and recognize, as the commencement of a building. . . As the avowed object and main purpose is to create an impression upon the mind of any person who seeks to purchase or acquire an interest or lien in the land, the acts indicating that a building thereon is being commenced ought to consist of work of such character that a person of ordinary observation could determine that a building was in the process of construction."

In *Thomas v. Mowers*, 27 Kan. 265, it was decided "that the commencement of a building within the meaning of the statute was at the time of the *commencement of the excavation for the cellar.*

Now what is the evidence as found by the Referee on this subject? "At an early hour of January 3, 1911, Bron entered upon the premises with laborers and did an hour or two's work toward excavating for the foundation of a building which was to be erected on the premises." (Rec. p. 9.)

In other words, this is exactly the kind of work that the Supreme Court of Kansas has held amounted to the commencement of the building. It was "the beginning to dig the foundation". There can be no doubt that the work of January 3rd was such as to indicate to any mind that the work of excavating for the foundation had been commenced. A ditch 5 to 6 inches deep, 18 inches wide and 38 feet long was dug that morning along the lines prescribed by stakes, which stakes outlined the foundation of the building. The shrubbery and brush had been cleared away, and a plow, scraper, picks and shovels were on the premises. Moreover, both Conklin and Kimball, the mortgagees, knew that a building was to be erected on this property and the work done was sufficient to notify them, with this knowledge in mind, that work had been commenced, had they looked that morning. The work, the Supreme Court of Kansas says, must be of such a character as to create an impression on the mind of the person who seeks to acquire a lien in the land. These mortgagees knew that a building was to be erected thereon, knew that it was to be commenced shortly, and the stakes set out there, together with the utensils for such labor and the clearing of the shrubbery and brush, and this ditch surely were sufficient to notify them that a building had been commenced. In any event the work on the morning of January 4th, done before the mortgages were recorded, was of a very substantial nature. The Circuit Court of Appeals (Rec. p. 150) concedes that work was done on the morning of January 4th. This work on the morning of the 4th was done by four men, who during the working day removed 15 wagon loads of dirt. (See p. 12 of this brief.) The Court of Appeals not having sufficient faith in its statement that the character of the work was not sufficient, really places its decision on the ground of the *motive* with which the work was done on the mornings of January 3rd and January 4th. (Rec. p. 150.)

III

THAT THE BANKRUPT, BRON, DID THE WORK ON THE MORNINGS OF JANUARY 3RD AND 4TH, 1911, WITH THE MOTIVE OR INTENT OF PREFERRING THE MECHANIC LIEN HOLDERS TO THE MORTGAGEES, CANNOT AFFECT THE RIGHTS OF THE MECHANIC LIEN HOLDERS, WHO HAD NO NOTICE OR KNOWLEDGE OF BRON'S MOTIVE OR INTENT.

That work was done by the bankrupt on the excavation for the foundation before the filing of the mortgages was a finding by the Referee which was approved by the District Court. The mortgages were not filed until after noon on January 4th. There was work done on the excavation in the morning of both January 3rd and 4th. The Referee found that it was fraudulently done and did not for that reason amount to a commencement of the building. He said (Rec. p. 10):

> "And the creditors having mechanic's liens, which were co-equal, were entitled to a third lien, without preference to any of them, their liens not having precedence over the mortgages, the actual beginning of the work not having been commenced until after the third day of January, 1911, the work done by the bankrupt on that day being fraudulently done by the bankrupt for the purpose of giving preference, over the two mortgages, to any mechanics liens to be thereafter created and established."

Of this contention the District Court said (Rec. p. 127):

> "In this respect, as has been seen, the referee finds in conformity to the proofs found in the record the first work was actually done on the lot toward the construction of the improvement early on the morning of January 3, 1911, prior to the time of the filing of the mortgages. However, the referee declines to take this as the time at which the building was actually commenced because of the intent which he finds in the mind of the bankrupt to prefer the mechanics and laborers to the mortgagees. However, the intent with which the bankrupt acted in this matter, even if true

> in point of fact, is not the criterion by which the rights of the parties litigant are to be judged and determined. If the work was commenced on the improvement within the meaning and intent of the statute, prior to the time at which the liens of the mortgages attached by their being filed for record, then the mechanics' liens are prior in point of equity to the liens of the mortgagees and must be so declared as to the Lumber Company here petitioning for review."

The Court of Appeals, however, took the view of the Referee, and while conceding that the work was done on the mornings of January 3rd and 4th, held that the work was not within the meaning of the statute being commenced fraudulently. (Rec. p. 150.)

It also stated that point in another part of the opinion as follows (Rec. p. 150):

> "It is true that under the Kansas statute as construed by the Supreme Court of that state, mechanics' liens date from the commencement of the building or improvement. *Thomas v. Mowers*, 27 Kan. 265; *Chicago Lumber Co. v. Schweiter; Getto v. Friend*, above, and *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335 (29 Pac. 153). This, of course, means a commencement of the building in good faith and not a mere pretense at commencement to defeat prior liens upon the property."

The Circuit Court of Appeals by this decision has added something to the Kansas statute which was never in it before. It adds the element of motive with which the work was done on which the statute is silent and which the Supreme Court of Kansas has never indicated should be in the statute.

The bankrupt Bron had title to and possession of the property more than a day before the mortgages were executed and recorded.

Between the conveyance to him of the property and the execution and recording of the mortgages work was done on the property, some being on the 3rd (Record 9) and again early in the morning of the 4th. (Record 27, 34, 56, 63.) So whatever Bron's intent was on the 3rd, work was

done on the 4th before the recording of the mortgages at 12:10 P. M. January 4th, 1911. This alone would give the mechanic lien holders a prior right.

But the Kansas mechanic lien law statute provides absolutely for a lien in favor of the material men "and such lien shall be preferred to all other liens or encumbrances which may attach to or upon said land, buildings or improvements or either of them subsequent to the commencement of such building."

If the dirt was actually removed in the course of excavating for the foundation or cellar the building had been commenced. The motive or intent of the laborer or one who directed the laborers who removed such dirt is immaterial. The controlling feature is the commencement of work. The statutes and the decisions of the Kansas Supreme Court date the mechanic's lien from the time the work is first done.

In the case of *West v. Badger Lumber Company*, 56 Kan. 287, it was held that the owner of real estate who was induced by fraud to convey the title thereto to another under a contract contemplating the construction of buildings thereon, cannot in an action to set aside the conveyance and discharge the property from all liens, defeat the claims of persons who in good faith relying on the apparent title of the fraudulent purchaser have furnished material and performed labor in the construction of the buildings and have complied with the statutory requirements in filing their liens. The fraud of the purchaser in the foregoing case in securing the title to the property did not affect the mechanics' liens, so in this case how can the fraud of the owner in starting the work affect the appellees who were not parties to that fraud, if any there was? We insist that innocent parties, such as the appellees, under the statute which gives mechanics' liens upon the commencement of the work should not be dependent upon the mental processes of the owner of the property and should not be compelled to become mind readers.

There is nothing in these cases to justify a doubt in regard to the *bona fides* of the claims of the lien holders. The evidence shows that the materials were furnished, as charged by the claimants, and the debts have not been paid. The Referee finds that the amounts are due, and the only

question is as to the priority of their claims over the mortgages. There is no intimation that they had any knowledge of the agreement between Bron and his mortgagees that no work should be begun until after the mortgages were filed. The Court of Appeals states that if the mechanic lien holders had examined the record, they would have found that the mortgages were executed and filed for record at the same time the deed to the bankrupt was executed, and as a part of one transaction. This misstates the facts, as stipulated by the parties and proved by the records. If the mechanic lien holders had examined the record, they would have found the deed to Bron dated December 31, 1910, acknowledged January 3, 1911, and filed for record January 4, 1911, at 11:40 o'clock A. M. They could continue their investigation and find that work had been commenced on the building on the morning of January 3rd, the day the deed was acknowledged, and continued on the morning of January 4th, before the mortgages were deposited for record.

When a Kansas statute provides that a mechanic shall have a lien which shall be preferred to all other liens, which shall attach subsequent to the commencement of the building—and another statute provides that a mortgage shall not be valid, except as to the parties, until the mortgage is deposited for record, it makes the dates when the respective acts were done the sole criterion in determining the priority between the mechanics' liens and the mortgages. It is conceded that when the date of the commencement of the building is fixed, that all mechanics' liens are determined by that date, no matter when the contract for the material was made or when the material was delivered. (Rec. p. 27.) When the material men ascertained when the building was commenced and when the mortgages were filed, they ascertained all the facts necessary in order to determine whether they could safely sell material to Bron. They found that the building was commenced when the excavation was begun and that date was before the mortgages were deposited for record. They then knew that a mechanic's lien would be prior to the mortgages. They were not chargeable with notice as to contracts between Bron and his mortgagees that were not of record. If they could see that the excavation had been begun and it was before the mortgages were deposited for record, they were safe in furnishing the material.

The Referee and the Court of Appeals give weight and

consideration to the motive or intent with which Bron commenced the excavation for the building before the mortgages were recorded. The Referee declined to accept the work done on January 3rd and the morning of January 4th, because he found that it was fraudulently done for the purpose of giving preference over the two mortgages. This, in effect, is charging the mechanic lien holders with knowledge of the purpose and motive of Bron in commencing the work, and injects into the Kansas statute an element which is not found therein. The mechanic lien holders were not parties to the fraud, if any was committed, and could not be affected by the motive of Bron. Being innocent parties, they could not be chargeable with his fraud on the mortgages. Fraudulently commencing a building is not a void act of itself so that no one may acquire rights by it. The situation of the mechanic lien holders is the same as that of an innocent third party purchasing a note which could not be enforced between the original parties, but which in no way prejudices the rights of an innocent holder. The case of *Gordon v. Torrey*, 15 N. J. Equity, 112, is a case clearly in point. In that case the building was commenced before the mortgage was executed, but the owner concealed from the mortgagee the fact of the existence of the mechanic liens. The court says:

> "If it be admitted that Torrey acted in violation of good faith in concealing or in failing to disclose the existence of the liens at the time he procured the loan from the complainant for which the mortgage was given, it cannot affect the legal or equitable rights of the lien holders. Nor are those rights at all impaired if it be admitted that the liens were filed at the instance of Torrey. He may, in perfect consistency with good faith and fair dealing, have desired that the just claims of the mechanics and material men should be secured upon the building, in preference to the Oakley mortgage, which he then believed, and subsequently proved to be fraudulent. But if Torrey was actuated by fraudulent motives it could not affect the rights of the lien holders. The validity of the liens cannot depend upon the motives which suggested their being filed. There is nothing in the evidence to affect the validity of the liens, or their priority to the complainant's mortgage."

It is often cited with approval, in "Phillips on Mechanics' Liens", Second Edition, Sec. 255, as follows:

> "It is no objection to the validity of mechanics' liens that the mortgagor procured them to be filed, or that he concealed them from the mortgagee at the time of obtaining the loan for which the mortgage was given. If the mortgagor was actuated by fraudulent motives, it cannot affect the rights of *bona fide* lien holders."

The Referee and District Court found that the property was conveyed to Bron on January 3rd. He testified that the deed was delivered to him on that day. He thus had a right on obtaining the legal title, the equitable title to which he had held since December 22, 1910, to commence work on the building on the day he got his deed. The Referee and Court of Appeals admit he did so. He had a right to commence the building on that day. By so doing, he may have violated an agreement made with Conklin and Kimball. That cannot affect the right of the mechanic lien holders to rely on the date of the commencement of the building, which was before the mortgages were recorded. Bron had the right to commence a building at any time after December 22nd. He did some work, in fact, during that month, but what he did on January 3rd was a commencement of the building under the Kansas statute, as construed by the Supreme Court of that state, and his motive in commencing the building then instead of later is immaterial.

Judge TAFT, in *Warax v. C. N. O. & S. Rlw. Co.*, 72 Fed. 640, said of *motive*: "If the right exists, the motive for its exercise cannot defeat it." He also held the same in *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 751, and Judge (afterwards Justice) LURTON concurred with him in both cases.

This court has repeatedly held that the motive which prompts the doing or not doing of an act is immaterial. In *D. W. & Co. v. C. M. & St. P. Ry. Co.*, 85 Fed. 876, 879, it was said:

> "The motive of the railway company in seeking a removal is to avoid a trial in the state court, and the motive of the plaintiff in joining the defendants is to avoid a trial in the federal court. These motives can

not be availed of to defeat the right of removal, if it legally exists, nor to defeat the right to remain in the state court, if the statute does not authorize a removal."

This case was cited with approval in *Chicago R. I. & P. Ry Co. v. Dowell*, 229 U. S. 102, 33 S. Ct. 684. See also *Illinois C. R. Co. v. Sheegog*, 215 U. S. 308, 30 S. Ct. 101.

We submit that under the law, as construed by the Supreme Court of Kansas, supported as these decisions are by the cases above referred to, that the finding of the Referee that he would not accept the work begun on January 3rd and the morning of January 4th because of Bron's motive in doing such work, was erroneous, and the Court of Appeals was in error when it accepted and approved this finding of the Referee. The District Court was right in holding that the motive or intent of Bron was immaterial, as against the mechanic lien holders, and as this question of motive is the controlling one in the case, being the basis of the decision of the Court of Appeals, the District Court's interpretation of the statute and the law should be upheld by this court.

IV.

MECHANIC LIEN CLAIMANTS ARE ENTITLED TO A LIEN UPON IMPROVEMENTS SEPARATE FROM THE LAND, REGARDLESS OF THE PRIORITY OF THE MORTGAGES.

The land which the District Court found was not worth over $2,300.00 was improved by the material of the mechanic lien holders to the extent of $13,300.00. (Rec. pp. 125, 67, 72.) We contend, with the District Court, that inasmuch as the money furnished by the mortgagees did not go to pay for the improvements on the land, and the mortgagees did not see that the money so advanced by them was applied in the payment of the material which went to improve the property, the mechanic lien holders are entitled to a first lien on the enhanced value of the property made so by their labor and material, regardless of the priority of the mortgagees.

On this the District Court said (Rec. p. 128):

46.) Bron, in fact, had the equitable estate in this property from December 22, 1910, and was the owner thereof from that date and could, under the Kansas law as declared by the Supreme Court of that state, contract with material men and mechanics liens would attach to the interest which he owned and be prior to any mortgages filed subsequent to the commencement of the excavation for the building. *Smith Lumber Co. v. Arnold*, 88 Kan. 465, 468.

The work of excavating for the foundation was actually commenced on January 3rd, shortly after eight o'clock. Stakes had been set some days before while the lot was covered with shrubbery and some trees. Between Christmas and New Year's the shrubbery and trees within the space marked by the stakes and in which the excavation for the cellar was made were removed. On January 2nd, while the son of the bankrupt was watching what is known as the "Bitting Fire", he met Underwood and Jones, who had been given the contract by the bankrupt for excavating for the cellar and foundation and told them to go to work the next morning at eight o'clock. At eight o'clock the morning of the 3rd the son of the bankrupt was on the property, and a few minutes thereafter Underwood came with a wagon, scraper, plows, picks and shovels. The stakes were remeasured, and it was found that owing to the shrubbery which had been there the stakes were not accurately set. (Rec. pp. 56, 61, 58, 60, 25, 52, 34, 66, 27.) The son of the bankrupt then reset the stakes, and Underwood used a pick to start the excavation. The ground was frozen to a depth of six or seven inches. Underwood dug a place about 18 inches wide, 5 to 6 inches deep and 38 feet long, working until about 10 o'clock, when he quit on account of the cold. Underwood hauled one full wagon load of dirt away and another small one. (Rec. pp. 55, 61.)

The next morning (January 4th) at eight o'clock Jones, Underwood and others continued the work of excavating, and worked all day, removing about 15 loads of dirt. The work was continued on the 5th and from day to day until completed. On January 7th (Saturday) Jones and Underwood got a check from Bron in order to pay off the laborers whom Jones and Underwood hired and who had been employed on the work of excavation during that week. (Rec. pp. 30, 56, 63, 66.) This is the testimony of Underwood who was employed on the work and who received pay for his

work before the bankruptcy proceedings, and therefore was an entirely disinterested witness. It is also the testimony of Jones, who occupied the same position as Underwood. (Rec. p. 150.)

Likewise it is the testimony of Charles Bron, the bankrupt, who was not financially interested in the matter of priority. Such also is the evidence of the son of the bankrupt who had no interest in the question of priority.

The testimony of these witnesses is supported in part by memoranda, part of which was made by Kimball himself. In fact, Kimball on January 3, 1911, delivered to Bron a check for $750.00 as an advancement on the mortgage. (Rec. pp. 16, 18, 47.) Kimball required that work be commenced before he made any advancement on a mortgage. For this reason Bron had the work started on the morning of January 3rd, and thereby was able to obtain a $750.00 check from Kimball on the afternoon of January 3rd, 1911. (Rec. pp. 47, 48, 16.)

Opposed to this is the testimony of E. D. Kimball, to whom the note was given and who had transferred it to one of the appellees; Mrs. Conklin, wife of one of the appellees; P. J. Conklin, one of the appellees; Stanley Conklin, son of the appellee Conklin; and C. L. Ginzel, son-in-law of the appellee Conklin. All of these testified positively that there was no work done on the lot, not even the shrubbery removed, until after January 8th.

Of these witnesses Mrs. Conklin testified that it was cold weather during the early part of January; that there was frost on her window through which she would have had to look to see whether any work was being done on the adjoining lot, and that she was ill with a heavy cold. (Rec. 93.) Stanley Conklin, son of appellee, had no distinct recollection of being on the north side of his home on January 4th. (Rec. p. 97.)

With this conflict of evidence, the Referee found that there was work done for a couple of hours on the morning of January 3rd toward the excavation for the foundation of the building which was to be erected on the premises. (Rec. p. 9.) In this finding of the Referee the District Court concurred. (Rec. p. 127.)

As both the Referee and the District Court on the con-

flict of evidence found that the bankrupt, his son, and Underwood and Jones were telling the truth as to the work on January 3rd, it follows that their testimony as to the work on January 4th must also be taken as true, though the Referee makes no specific finding as to the work on that date. Under the rule of this court that on a conflict of evidence the findings of fact of the Referee approved by the District Court will be followed, it is evident that the property was conveyed to the bankrupt on January 3, 1911, and that work was commenced on that day for the excavation of the foundation, and a ditch 38 feet long, 6 inches deep and 18 inches wide was dug on the morning of January 3rd, and the excavating continued on the morning of January 4th prior to the recording of the mortgages involved herein.

In this connection we wish to call attention to another mistake in the statement of the evidence by the Circuit Court of Appeals. That court stated that on January 3rd it was so cold that Mrs. Conklin could not go out to complete the execution of the deed to the property to the bankrupt. (Rec. p. 149.) This, however, it directly contrary to Mrs. Conklin's testimony. She states that she took a heavy cold the night of the "Bitting Fire" (the night of January 2nd) and was too ill to go down town the next day, which was the reason the deed was brought to her house for her signature. (Rec. pp. 91, 93.)

II.

UNDER THE KANSAS STATUTE, AS CONSTRUED BY THE SUPREME COURT OF THAT STATE, A BUILDING IS COMMENCED WHEN WORK OR LABOR IS BEGUN ON THE EXCAVATION FOR THE FOUNDATION, WHICH IN THIS CASE WAS ON THE MORNING OF JANUARY 3RD, AS FOUND BY THE REFEREE AND APPROVED BY THE DISTRICT COURT.

The District Court found that the work done before the filing of the mortgages amounted to the commencement of the building. See Record p. 128, where the District Court said:

"Under the decisions of the Supreme Court of this

party so assigning or granting the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

"3838. *Debt of another, etc.*—6. No action shall be brought, whereby to charge a party . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized *in writing*."

A mortgage comes within the provisions of this statute. *Bell v. Coffin*, 2 Kan. A. 337.) The mortgage to Kimball (the New Hampshire Savings Bank mortgage) for $7,500.00 was not a purchase price mortgage, and depends for its rights entirely on the fact of the time of its filling for record. The verbal agreement that this mortgage should be filed of record at the same time the deed was deliverd was void under the above statute, as it attempted to confer an estate in lands longer than one year in duration. As it was void, no matter when the deed was delivered, the mechanic liens attached ahead of this mortgage. The deed was filed of record at 11:40 A. M., and the mortgage was not recorded until 12:10 P. M. In the meantime the beginning of the excavation for the foundation had taken place on the lots and for thirty minutes the title vested in Bron, under any view of the facts, before the rights of the Kimball mortgage attached. Momentary seizin is sufficient to permit the rights of lien holders to attach. (*Osborn v. Barnes*, 179 Mass. 597, 61 N. E. 276; *Ansley v. Pasharo* (Neb.), 35 N. W. 885.)

Moreover, mechanic lien holders are generally considered purchasers for value under the recording acts. (27 Cyc. 240.)

The agreement to make the Kimball mortgage a first mortgage, not having been recorded, was void as to the mechanic lien holders. So under either view of the law the oral agreement was void as to the appellants, and therefore

the rights of Kimball did not attach until after the liens of the mechanic lien holders.

The cases which the Circuit Court of Appeals cites do not have any bearing on this phase of the matter. (Rec. p. 147.)

The case of *Huff v. Jolly*, 41 Kan. 537, deals only with the question of title and right of possession and has nothing to do with priority of mortgages.

In the case of *Chicago Lumber Company v. Schweiter*, 45 Kan. 207, the contract between the vendor and vendee and the mortgagees was in writing, and therefore the question of the statute of frauds was not involved.

The report of the case of *Getto v. Friend*, 46 Kan. 24, does not show whether the agreement with Getto preferring the mortgages of George C. Strong (afterwards assigned to Melrose and Rogers) to his purchase price mortgage was in writing or oral. The question of the statute of frauds was not raised, but the court did hold that the mechanic lien holders should be prior to all mortgages on the equitable estate of Peavey (the man who erected the building) except to the amount of the purchase price mortgage.

The cases of *Missouri Valley Lumber Company v. Reid*, 4 Kan. A. 4, and *Wagar v. Briscoe*, 38 Mich. 587, have to do with purchase price mortgages only.

The cases of *Hayes v. Fessenden*, 106 Mass. 230, and *Conrad v. Starr*, 50 Iowa 470, do not involve a mortgage such as the Kimball mortgage (New Hampshire Savings Bank, assignee). The oral agreement that the execution of the deed and delivery of the two mortgages should create one transaction could in any event apply only to the purchase price mortgage, to wit, the Conklin mortgage (27 Cyc. 250, and cases cited). It has no application whatever to an ordinary mortgage. As such an oral agreement as to the Kimball mortgage cannot be invoked against the mechanic lien holders who had no notice or knowledge of such agreement, the Kimball mortgage did not attach until it was filed of record, as it was void under the recording acts of Kansas until it was recorded. At the time it was recorded the deed to Bron to the property had been of record for thirty minutes, and under the findings of the Referee and the District Court it had been delivered for almost a day, and the

excavation had been commenced. Therefore, the appellants should at least be prior to the Kimball mortgage (New Hampshire Savings Bank, assignee), whatever may be the rights of Conklin and the assignee of Kimball as between themselves.

CONCLUSION.

The appellants in this court of course want to collect their debts by establishing the priority of their liens. But there is a more important question involved which is the reason for these cases being here. Appellants are dealers in lumber and other building materials. They do business in Kansas and in Oklahoma, whose mechanic lien law is similar to the Kansas law. They have conducted their business and sold their materials relying on their right to establish liens on the property whose value has been enhanced by the materials so furnished. Under the Kansas law as construed by the Supreme Court of that state, they have heretofore relied on the public record and the date of the commencement of the building. They could thus determine whether they were in position or not to establish a lien. The Judge of the District Court who decided these cases below, construed the statute as the Kansas Supreme Court had construed it. He had been at one time a member of that court, and was familiar with its decisions.

Appellants believe that the Court of Appeals has put an unwarranted construction on the Kansas statute. That court has injected into it the question of the motive or good faith of the owner in the commencement of the building. It would place mechanics and building material dealers at the mercy of owners and their mortgage creditors, and would give force and effect to oral, secret agreements between them of which the mechanics and building supply dealers have no knowledge. The decision of the Court of Appeals amends the Kansas law, and by doing so emasculates it and makes it hazardous and unsafe to rely upon in the conduct of their business. They are not in a position to ascertain or determine the good faith or motive with which an owner commences a building. They should not be compelled to do so. They are not required to do so in the state courts, and the result of this case will determine whether they can rely on a construction of a state statute

which has been given to it by the highest court of the state, and which contains no Federal question.

The Referee, the District Court, and the Court of Appeals found that work was done on January 3, 1911, the day before the mortgages were filed for record, but the Referee and the Court of Appeals said it was done fraudulently and not in good faith, and in order to give preference to the mechanic liens. The District Court held that the intent or motive in doing the work was immaterial, so long as it was done before the mortgages were filed, and we contend that the District Court was right and should be affirmed, and that the Court of Appeals was wrong and should be reversed.

Respectfully submitted,

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